17-71636

United States Court of Appeals for the Ninth Circuit

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al.,

Petitioners,

STATES OF NEW YORK, CALIFORNIA, HAWAII, MARYLAND, MASSACHUSETTS, VERMONT, and WASHINGTON, and the DISTRICT OF COLUMBIA,

Petitioners-Intervenors,

v.

SCOTT PRUITT, Administrator of United States Environmental Protection Agency; U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Petition for Review of the Order of the Administrator of the United States Environmental Protection Agency

BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA, HAWAII, MARYLAND, MASSACHUSETTS, VERMONT, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA

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* Motion to intervene granted March 6, 2018 (ECF #68).

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PRELIMINARY STATEMENT

Chlorpyrifos is a toxic chemical that has become nearly ubiquitous in the food supply due to its use as a pesticide. Under FFDCA,[1] EPA may leave a tolerance for pesticide residues in place *only* if the Administrator determines that the tolerance is safe. In November 2016, EPA concluded that it could not find chlorpyrifos safe. The Administrator's Order four months later still did not make a finding of safety. Yet, contrary to FFDCA's mandate, the Administrator denied the pending administrative petition and left the tolerances in effect.

Rather than address this critical issue, EPA raises a raft of procedural objections to this Court's review, all of which lack merit. This Court should therefore reach the merits and compel EPA to protect Intervenors' most vulnerable residents and others from continued chlorpyrifos exposure.

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[1] The abbreviations and citation forms adopted in Intervenors' opening brief are continued herein.

UPDATE TO STATEMENT OF THE CASE

As we previously demonstrated (Intervenors' Br. 43-44), Petitioners and Intervenors attempted to use the administrative process by filing objections on June 5, 2017. Their objections addressed pure issues of law and did not request an evidentiary hearing. In light of that fact, and bearing in mind FFDCA's directive that a final order on such objections be issued "[a]s soon as practicable," 21 U.S.C. § 346a(g)(2)(C), Petitioners and Intervenors requested EPA's response within 60 days.

Those objections were filed more than 10 months ago. Intervenors' residents continue to be exposed to pesticide residues that EPA has not found safe. EPA has done nothing in response to the objections.

ARGUMENT

POINT I

FFDCA'S EXHAUSTION PROVISIONS ARE NOT JURISDICTIONAL AND DO NOT PRECLUDE REVIEW HERE

Preliminarily, EPA does not—and cannot—defend the Administrator's Order on the merits. Rather, EPA argues only that the petition was procedurally improper because the agency has not yet issued a final order resolving the administrative objections. (*See* EPA Br. 13-30.) For purposes of judicial review at this stage, the Court should therefore

accept Intervenors' arguments on the merits. *Cf. International Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404-05 (9th Cir. 1985) (declining to address merits of contention not raised on appeal).[2] Among other things, Intervenors have shown that:

- the Administrator's Order violated FFDCA by leaving chlorpyrifos tolerances in effect without a finding of safety as required by 21 U.S.C. § 346a(b)(2)(A) (Intervenors' Br. 48-49);

- the Administrator's Order violated FFDCA's separate directive that the Administrator ensure there is a reasonable certainty that aggregate exposure will not harm infants and children, and that he publish a "specific determination regarding the safety of

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[2] Although the registrant, amicus curiae Dow Agrosciences LLC, attempts to defend the Administrator's Order on the merits, absent exceptional circumstances (which are not present here) this Court "do[es] not address issues raised only in an amicus brief." *Artichoke Joe's Calif. Grand Casino v. Norton,* 353 F.3d 712, 719 n.10 (9th Cir. 2003); *accord Santiago v. Rumsfeld,* 425 F.3d 549, 552 n.1 (9th Cir. 2005). In any event, Dow's brief largely collects debate from the Scientific Advisory Panel over the extent to which reliance on particular studies was advisable. (*See* Dow Br. 5-6, 8-9, 20-21, 23-26.) The Panel, however, provided a "path forward" for EPA (ER1252), and EPA took the Panel's advice: in November 2016, the agency "modif[ied] the methods and risk assessment used to support [its] finding in accordance with" the Panel's recommendations. (ER1291; *accord* ER1251-1253, 1292 [model used by EPA for November 2016 analysis "continues to be supported" by Panel].) Using the approaches recommended by the Panel, EPA's analysis confirmed that exposure to chlorpyrifos from residues on most food crops exceed FFDCA's "reasonable certainty of no harm" safety standard; that exposures to chlorpyrifos in drinking water "continue to exceed safe levels"; and that EPA could not "identif[y] a set of currently registered uses that meets the FFDCA safety standard." (ER1291.)

the pesticide chemical residue for infants and children," as required by 21 U.S.C. §§ 346a(b)(2)(C)(ii)(I) and (II) (Intervenors' Br. 49);

- the Administrator's Order failed to explain adequately EPA's change in position or the purported scientific uncertainty on which that change was based (Intervenors' Br. 51-58); and

- the record does not support a finding that FFDCA's safety standard has been met (Intervenors' Br. 61-63).

In its brief, EPA contends that FFDCA's provisions authorizing judicial review of the Administrator's orders on objections create a jurisdictional bar (EPA Br. 13-20) and should be enforced here even if they are not jurisdictional (EPA Br. 22-30). As explained below, administrative exhaustion is not a jurisdictional prerequisite under FFDCA and thus exhaustion may be excused on a showing of futility. That showing was made here. Alternatively, judicial review is available under other provisions of law because EPA's delay has rendered administrative exhaustion not "obtainable," within the meaning of 21 U.S.C. § 346a(h)(5).

A. FFDCA's Review Provisions Do Not Limit This Court's Jurisdiction.

Exhaustion is not a condition of the Court's jurisdiction under FFDCA. This Court has "rarely found exhaustion statutes to be a jurisdictional bar." *McBride Cotton & Cattle Corp. v. Veneman,* 290 F.3d 973, 978 (9th Cir. 2002). To enshrine exhaustion as a jurisdictional bar, a statute must be "'more than a codified requirement of administrative exhaustion'"; it must "contain[] 'sweeping and direct' language that goes beyond a requirement that only exhausted claims be brought." *Id.* (*citing Weinberger v. Salfi,* 422 U.S. 749, 757 (1975), and *Anderson v. Babbitt,* 230 F.3d 1158, 1162 (9th Cir. 2000)). Congress must "'clearly state[]'" that a procedural requirement is "'jurisdictional'" before it may be given such effect. *Reed Elsevier, Inc. v. Muchnick,* 559 U.S. 154, 163 (2010) (quoting *Arbaugh v. Y&H Corp.,* 546 U.S. 500, 515 (2006)). Adopting that plain-language standard, this Court has found exhaustion to be a jurisdictional requirement "where the exhaustion statute explicitly limits the grant of subject matter jurisdiction and is an integral part of the statute granting jurisdiction." *McBride Cotton,* 290 F.3d at 979.

FFDCA's exhaustion provisions do not meet that high bar. FFDCA does not contain an express provision precluding judicial review in the

absence of exhaustion, such as the one found in the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). *See* 8 U.S.C. § 1252(d) (courts "may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right"); *see also Barron v. Ashcroft,* 358 F.3d 674, 677 (9th Cir. 2004) (finding IIRIRA's exhaustion requirement jurisdictional). Instead, EPA's jurisdictional argument depends on the interaction of three separate FFDCA subsections, none of which expressly sets up administrative exhaustion as a jurisdictional prerequisite.

First, the grant of "exclusive jurisdiction" in 21 U.S.C. § 346a(h)(2) does not limit this Court's subject-matter jurisdiction. Rather, that grant limits the jurisdiction of *other* courts and administrative agencies. As the district court held in a decision on which EPA relies (*see* EPA Br. 18-19), this provision ensures that a litigant challenging an administrative decision governed by FFDCA "cannot, by skipping the internal review procedures of subsection 408(g), avoid the jurisdiction of the Courts of Appeals and proceed instead to the District Courts under the APA." *New*

York v. EPA, 350 F. Supp. 2d 429, 438 (S.D.N.Y. 2004), *aff'd sub nom. NRDC v. Johnson,* 461 F.3d 164 (2d Cir. 2006).[3]

Second, the limitation imposed by 21 U.S.C. § 346a(h)(5) does not restrict this Court's subject-matter jurisdiction. Under that provision, "[a]ny issue as to which review is or was obtainable under this subsection shall not be the subject of judicial review under any other provision of law." The provision forecloses the possibility of review under other statutory schemes, and thus reduces the risk of duplicative proceedings. It does not, as EPA argues (EPA Br. 21), limit the claims that are subject to judicial review under FFDCA.

Third, EPA's position finds no support in the statute's provision that adversely affected parties "may obtain judicial review" in the Court of Appeals of orders issued under 21 U.S.C. § 346a(g)(2)(C). *See* 21 U.S.C. § 346a(h)(1). In *Henderson v. Shinseki,* the Supreme Court held that a

[3] Indeed, the district court in *New York v. EPA* did not hold FFDCA's exhaustion provision jurisdictional. Instead, it held that EPA's actions leaving tolerances in effect constituted reviewable final orders, *id.* at 435-36, but that plaintiffs could not obtain that review in the district court under the APA because of FFDCA's exclusivity provision, *id.* at 446. On appeal, the Second Circuit affirmed based on the district court's exclusivity analysis. *See NRDC v. Johnson,* 461 F.3d at 172-76.

statute setting forth the procedure "to obtain review" of Board of Veterans' Appeals decisions did not "speak in jurisdictional terms or refer in any way to the jurisdiction" of the reviewing court. 562 U.S. 428, 438 (2011) (quotation marks omitted). Such language does not "explicitly limit[]" the Court's subject-matter jurisdiction. *See McBride Cotton,* 290 F.3d at 979. Rather, this language is the sort of "codified requirement of administrative exhaustion" that this Court has held insufficient to create a jurisdictional bar. *Anderson,* 230 F.3d at 1162 (quotation marks omitted); *see also Henderson,* 562 U.S. at 435 (rules "requiring that the parties take certain procedural steps at certain specified times" are not jurisdictional).

Contrary to EPA's assertion (EPA Br. 17), this case is not controlled by *Gallo Cattle Co. v. United States Department of Agriculture,* 159 F.3d 1194 (9th Cir. 1998). The *Gallo Cattle* Court embraced the premise that, without exception, "statutorily-provided exhaustion requirements deprive the court of jurisdiction and, thus, preclude any exercise of discretion by the court." *Id.* at 1197. That view of the law did not survive *McBride Cotton,* which recognized that exhaustion statutes "rarely" create a jurisdictional bar. 290 F.3d at 978. Indeed, in *McBride Cotton,*

this Court explained that the statute in *Gallo Cattle* was jurisdictional because it "explicitly granted the district court jurisdiction over only those claims which had previously been presented to the Secretary by administrative petition." *Id.* at 979-80.

FFDCA contains no such explicit limitation. While it vests original jurisdiction in the Court of Appeals to review the Administrator's orders on objections, 21 U.S.C. § 346a(g)(2)(C), (h)(1), it contains no express language closing the courtroom doors where, as here, exhausting such administrative remedies would be futile. One purpose of the futility exception is to permit judicial review where the challenged decision is, in effect, a final one. *See, e.g., Herrington v. County of Sonoma,* 857 F.2d 567, 570 (9th Cir. 1988). (*See infra* Point I(B).)

Finally, the Court should not accept EPA's citation of its own regulation as authority for constricting the Court's subject-matter jurisdiction. (*See* EPA Br. 13-14, 18.) Executive agencies do not possess "power to strip a federal court of its jurisdiction." *Nehmer v. U.S. Dep't of Veterans Affairs,* 494 F.3d 846, 860 n.6 (9th Cir. 2007).

B. FFDCA's Exhaustion Provisions Do Not Apply Because Exhaustion Would Be Futile.

Because FFDCA's exhaustion provisions are not jurisdictional, exhaustion can and should be excused based on the judicially created doctrine of futility. (*See* Intervenors' Br. 13-15; Petitioners' Br. 1, 2, 25-26, 41, 44-47.)

"This court, along with every other circuit to consider the issue, has held that there is no exhaustion requirement if resort to the agency would be futile." *SAIF Corp./Oregon Ship v. Johnson,* 908 F.2d 1434, 1441 (9th Cir. 1990); *see, e.g., McBride Cotton,* 290 F.3d at 982 (finding failure to exhaust administrative remedies was excused due to futility). Requiring exhaustion here would be futile.

First, further resort to the administrative process would be futile because of EPA's inaction. Intervenors and Petitioners attempted to use EPA's administrative review procedure, each filing objections to the Administrator's Order. (ER165-183 [Intervenors], 121-164 [Petitioners].) Because their objections raised pure issues of law, they disclaimed any need for an administrative hearing. (*See* ER176 [Intervenors], 128 [Petitioners].) *See Leedom v. Kyne,* 358 U.S. 184, 188-89 (1958); *Briggs v. Sullivan,* 886 F.2d 1132, 1140-41 (9th Cir. 1989). Accordingly,

Intervenors and Petitioners reasonably requested EPA's response within 60 days. (ER167, 176 [Intervenors]; ER149, 163 [Petitioners].) EPA was required by law to address those objections "[a]s soon as practicable." 21 U.S.C. § 346a(g)(2)(C).

Instead, EPA has unreasonably stalled. It has taken no action on the objections for more than 10 months. And EPA has not attempted to excuse its inaction either.

Notwithstanding EPA's contrary assertion (EPA Br. 33 n.8), the agency's failure to act on the filed objections must be viewed against the backdrop of its decade-long history of delay in addressing PANNA/NRDC's 2007 petition. It took EPA until November 2015—more than eight years—to publish its intention to revoke all chlorpyrifos tolerances. (ER1133.) Even that action occurred only after extended proceedings before this Court, which criticized EPA's "cycle of incomplete responses, missed deadlines, and unreasonable delay." *See PANNA v. EPA*, 798 F.3d 809, 813 (9th Cir. 2015). This Court characterized EPA's delay in taking action as "objectively extreme." *PANNA v. EPA*, 840 F.3d 1014, 1015 (9th Cir. 2016) (quotation marks omitted).

EPA's delay is ongoing. The Administrator's Order did not decide the merits of PANNA/NRDC's administrative petition to revoke the chlorpyrifos tolerances. Rather, the Administrator denied PANNA's petition in favor of "further evaluation of the science during the remaining time for completion of registration review" (ER27). That deadline does not run until October 2022 (ER34). Yet Congress intended registration review under FIFRA to be separate from, and considerably less urgent than, a tolerance review under FFDCA. (*See* Intervenors' Br. 59-60.) Thus, despite the APA's command to conclude administrative review within "a reasonable time," 5 U.S.C. § 555(b), EPA has announced that it will delay any action on chlorpyrifos tolerances, potentially for years.

Second, exhaustion would be futile for Intervenors' residents, particularly infants and children, who are presently being exposed to levels of chlorpyrifos residue that EPA has not found safe. Those residents risk irreparable injury if the exhaustion requirement is enforced. *See Bowen v. City of New York,* 476 U.S. 467, 483 (1986); *accord Mathews v. Eldridge,* 424 U.S. 319, 331 (1976) (exhaustion waived where claimant "raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous

termination would damage him in a way not recompensable through retroactive payments"). If Intervenors' residents are to benefit from FFDCA's safety standard, they must be able to obtain immediate judicial review of the Administrator's Order. *See McCarthy v. Madigan,* 503 U.S. 140, 147 (1992) (exhaustion may not apply where "a particular plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim").

EPA has not provided any meaningful response to Intervenors' assertion of futility caused by agency delay. While EPA attacks Petitioners' supposed reliance on a December 2017 letter to Senator Udall (EPA Br. 26-27), Intervenors neither cited nor relied on that letter. EPA's argument that Petitioners have "not presented clear evidence" that the administrative decision "has already been determined" (EPA Br. 27) is similarly misguided when applied to Intervenors' arguments. Intervenors' point is not that the decision has been predetermined, but rather that the decision has not been made at all, and EPA provides no reason to believe one is forthcoming.

To be sure, this Court opined in *PANNA v. EPA* that petitioners in that case needed to exhaust their administrative remedies before

obtaining judicial review of EPA's response to their petition. 863 F.3d 1131, 1132-33 (9th Cir. 2017). That decision, however, does not require dismissal of the instant petition. *PANNA* was issued July 18, 2017, only six weeks after Intervenors and Petitioners filed their objections. Thus, it did not contemplate that EPA would fail to act on the objections and thereby render administrative exhaustion futile. Indeed, in response to the motion for further mandamus relief in *PANNA*, EPA observed that "the objections process is beyond the scope of this litigation." *PANNA,* No. 14-72794, ECF Dkt. Entry 58 at 17. Consequently, this Court did not examine the issue of futility in that case.

Finally, EPA contends that futility "cannot defeat statutorily-mandated procedures" (EPA Br. 19). Its cited cases do not say that, however. In particular, in *Sun v. Ashcroft,* this Court underscored the Supreme Court's instruction that courts should "not read futility or other exceptions into statutory exhaustion requirements *where Congress has provided otherwise.*" 370 F.3d 932, 941 (9th Cir. 2004) (emphasis in original; quotation marks omitted). Although the *Sun* Court expressly emphasized those last five words, EPA omits them from its quotation.

(*See* EPA Br. 19-20.) And no wonder: FFDCA nowhere addresses futility, let alone "provides" that it should not apply.[4]

C. Alternatively, If Review Is Not "Obtainable" Under FFDCA, This Court Should Consider Intervenors' and Petitioners' Claims Under FIFRA.

Even if FFDCA's exhaustion provisions were jurisdictional—and they are not—review would still be possible. The exclusive judicial review provided by FFDCA is expressly limited to issues "as to which review is or was obtainable under this subsection." 21 U.S.C. § 346a(h)(5). As we previously explained (Intervenors' Br. 7-8), if such review is not obtainable, then other provisions of law, specifically FIFRA § 16(b), authorize the Court to review the underlying petition.

In *Ross v. Blake,* 136 S. Ct. 1850 (2016), the Supreme Court construed an analogous provision in the Prison Litigation Reform Act, which requires that prisoners challenging the conditions of their

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[4] In *Weinberger v. Salfi* (cited at EPA Br. 19), the Supreme Court concluded that under the Social Security Act provision there at issue, a "final decision" was a "statutorily specified jurisdictional prerequisite." *Id.,* 422 U.S. at 766. Here, in contrast, Intervenors have established that FFDCA's exhaustion provision is not jurisdictional. (*See supra* Point I(A).)

confinement first exhaust "such administrative remedies as are available." *See* 42 U.S.C. § 1997e(a). The Court explained that this qualifier meant prisoners "need not exhaust remedies if they are not 'available.'" *Ross,* 136 S. Ct. at 1855. And remedies are not "available" if they are "not capable of use to obtain relief"; for example, where they "operate[] as a simple dead end" with administrators "unable or consistently unwilling to provide any relief." *Id.* at 1859; *accord Andres v. Marshall,* 867 F.3d 1076, 1078-79 (9th Cir. 2017) (administrative process was unavailable when prison officials "improperly failed to process" prisoner's grievance).

Here, similarly, FFDCA's administrative exhaustion process has proven not to be "obtainable." Contrary to EPA's assertion that Petitioners "are obtaining" administrative review (EPA Br. 21), EPA has failed to take any action within a reasonable time. It has not even offered to act by any date certain. Administrative review under FFCDA is therefore not "obtainable," within the meaning of 21 U.S.C. § 346a(h)(5), and the Court has jurisdiction to review the petition under FIFRA § 16(b), 7 U.S.C. § 136n(b).

POINT II

AT A MINIMUM, THE FACTS AND CIRCUMSTANCES WARRANT MANDAMUS RELIEF

A. The Request for Mandamus Relief Is Procedurally Proper.

The Court should reject EPA's argument (EPA Br. 31-32) that, because the underlying petition allegedly was not filed in accordance with Rule 21(a) of the Federal Rules of Appellate Procedure, mandamus relief is unavailable.

Rule 21(a) governs the form of petitions to the Courts of Appeals for writs of mandamus or prohibition "directed to a court," *i.e.*, petitions to compel or enjoin action by a court. The quoted phrase "is intended to distinguish subdivision (a) from subdivision (c)," which "governs all other extraordinary writs, including a writ of mandamus or prohibition directed to an administrative agency rather than to a court." Fed. R. App. P. 21, Advisory Committee Notes to 1996 Amendments, *reprinted in* Federal Civil Judicial Procedure & Rules at 480 (ThomsonReuters 2017 ed.). The rule is implicated when "parties to the proceeding in the trial court" seek to challenge an action of the trial court. Fed. R. App. P. 21(a). The instant petition does not seek a writ "directed to a court," and thus is not subject to Rule 21(a).

Under Rule 21(c), an application for an extraordinary writ "other than one provided for in Rule 21(a)" is made simply "by filing a petition with the circuit clerk with proof of service on the respondents." And proceedings on the application need conform to the procedures prescribed in Rule 21(a) and (b) only "so far as is practicable." Fed. R. App. P. 21(c).

The underlying petition with proof of service was duly filed with the circuit clerk. (*See* ECF Dkt. Entry 1-1.) And the Court should find that the petition substantially complied with other applicable procedures. While the petition sought "review" of the Administrator's Order rather than using the word "mandamus" (*see id.* at 1), its labeling does not preclude relief. This Court "may construe an appeal of an otherwise non-appealable order as a petition for a writ of mandamus." *Plata v. Brown,* 754 F.3d 1070, 1076 (9th Cir. 2014); *see also Hernandez v. Tanninen,* 604 F.3d 1095, 1099 (9th Cir. 2010) (explaining that Court will so construe an appeal where "mandamus is itself justified"); *Barnes v. Sea Hawaii Rafting, LLC,* No. 16-15023, __ F.3d __, 2018 WL 1513087, at *11 (9th Cir. Mar. 28, 2018) (same). And the record amply establishes that mandamus is justified here. (*See* Intervenors' Br. Points III & IV; *see also infra* Points II(C), (D).)

Moreover, as we previously demonstrated (Intervenors' Br. 67), this Court has separate authority to issue a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a), which EPA fails to address. The All Writs Act empowers federal courts to issue "all writs necessary or appropriate . . . and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). A party may obtain mandamus relief under the All Writs Act even if it "has not formally sought mandamus relief through the typical channel of filing a petition for mandamus under Fed. R. App. P. 21(a)." *Eastwind Group, Inc. v. National Union Fire Ins. Co.,* 47 F. App'x 83, 84 (3d Cir. 2002).

Even if the petition were improper in form, the remedy would not be to reject it outright, as EPA suggests (EPA Br. 34). Rather, the Court should grant Petitioners leave to amend the petition, and/or grant Intervenors leave to file their own petition in this matter. Leave to amend should be given "freely . . . when justice so requires," Fed. R. Civ. P. 15(a)(2), and should be "guided by the underlying purpose" of "facilitat[ing] decisions on merits, rather than on technicalities or pleadings." *James v. Pliler,* 269 F.3d 1124, 1126 (9th Cir. 2001); *accord United States v. Webb,* 655 F.2d 977, 979 (9th Cir. 1981).

B. Intervenors Have Article III Standing to Seek Mandamus Relief.

In a footnote, EPA mistakenly asserts that Intervenors "have not established Article III standing in this matter" (EPA Br. 30 n.6).

As the evidence before the Court amply demonstrates, Intervenors' residents are being exposed to chlorpyrifos, including on foods at levels EPA has not found safe. (ER167, 407-409; ECF Dkt. Entry 5 ¶¶16, 19; ECF Dkt. Entry 54 ¶¶10, 13; ECF Dkt. Entry 38-5 ¶¶7-8, 12; ECF Dkt. Entry 38-14 ¶¶4, 9; ECF Dkt. Entry 38-19 ¶11; ECF Dkt. Entry 38-20 ¶¶14-16, 18, 26, 31; ECF Dkt. Entry 38-23 ¶¶2, 13.) Some of Intervenors' residents have been poisoned by chlorpyrifos. (ECF Dkt. Entry 38-20 ¶¶8-9, 27.) Five to eight million pounds of chlorpyrifos are used annually in agriculture on a wide variety of crops, including apples, strawberries, bananas, pears, peaches, nectarines, cherries, broccoli, walnuts, cauliflower, corn, onions, and soybeans. (ER131, 168.)

With those facts in mind, acting in *parens patriae* and on their own behalf, Intervenors have demonstrated three compelling interests underlying their participation in this lawsuit. First, the Administrator's Order will prolong the continuing risk of injury to the health and safety of Intervenors' residents. (*See* Intervenors' Br. 3-4; ECF Dkt. Entry 5

¶¶14, 16, 19; ECF Dkt. Entry 54 ¶8.) Second, Intervenors have an interest in ensuring that their residents receive the benefits and protections of federal pesticide safety standards. (*See* Intervenors' Br. 4; ECF Dkt. Entry 5 ¶¶17-18; ECF Dkt. Entry 54 ¶¶11-12.) Third, Intervenors and their residents incur increased health-care and related costs due to adverse health effects from chlorpyrifos exposure. (*See* Intervenors' Br. 4 & n.3.)

EPA neither disputes these interests nor explains how they could be insufficient to support standing. In fact, Supreme Court precedent says they are more than enough. A State's *parens patriae* interests support standing when "an alleged injury to the health and welfare of [the State's] citizens . . . is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Alfred L. Snapp & Son., Inc. v. Puerto Rico,* 458 U.S. 592, 607 (1982).

Thus, for example, in *Massachusetts v. EPA,* 549 U.S. 497 (2007), when Congress "ordered EPA to protect Massachusetts (among others)" by prescribing motor vehicle emissions standards, *id.* at 519, the Supreme Court held that "EPA's steadfast refusal to regulate greenhouse gas emissions present[ed] a risk of harm to Massachusetts that is both

'actual' and 'imminent,'" *id.* at 521. Massachusetts could regulate point-sources within its borders, but could not "invade Rhode Island to force reductions in greenhouse gas emissions" or "negotiate an emissions treaty with China or India." *Id.* at 519.

Similarly here, Intervenors have no power to revoke federal tolerances that allow chlorpyrifos to be sprayed on food grown in other States. And given the national markets for foods, regulatory action by Intervenors alone to curtail human exposure cannot be fully effective to protect their residents. (ER167.) Intervenors must therefore rely on the federal government to act. When the federal government violates the law by allowing tolerances to remain in effect without a finding of safety, a State "has standing" to "assert its rights under federal law." *Massachusetts v. EPA,* 549 U.S. at 520 n.17.

The case cited by EPA, *Town of Chester v. Laroe Estates,* 137 S. Ct. 1645 (2017), does not provide otherwise. *Town of Chester* holds simply that if an intervenor seeks relief different from that sought by petitioners, it must demonstrate standing to obtain that relief. *Id.* at 1651. Intervenors do not dispute that proposition. But EPA has not shown how

Intervenors seek relief different from that sought by Petitioners, or why Intervenors would lack standing if they did.

C. The Court Should Grant Mandamus Relief to Require EPA to Finalize its Proposed Rule Revoking Chlorpyrifos Tolerances.

We previously analyzed the applicable factors and urged the Court to issue a writ of mandamus to remedy EPA's delay in finalizing its November 2015 rulemaking to revoke the chlorpyrifos tolerances. (*See* Intervenors' Br. 63-68.) Among other things, we pointed to EPA's failure to "conclude a matter presented to it" within "a reasonable time," as required by 5 U.S.C. § 555(b). And we highlighted the unreasonableness of leaving chlorpyrifos tolerances in effect when they have not been found safe.

In response, citing *Environmental Integrity Project v. McCarthy,* 139 F. Supp. 3d 25 (D.D.C. 2015), EPA contends that "'[a]n agency may decide not to proceed with a proposed rule.'" (EPA Br. 30 n.6.) That proposition does not apply here, because the statute expressly permits EPA to leave a pesticide tolerance in effect "*only* if the Administrator determines that the tolerance is safe." 21 U.S.C. § 346a(b)(2)(A)(i) (emphasis added). EPA has been unable to find the chlorpyrifos

tolerances safe. If a tolerance is not safe, the Administrator "*shall* modify or revoke" it. *Id.* (emphasis added).

D. Alternatively, the Court Should Grant Mandamus Relief to Compel the Administrator to Respond Promptly to Intervenors' Pending Objections.

Alternatively, and as we previously urged (Intervenors' Br. 69-71), the Court should grant mandamus relief compelling the Administrator to act on Intervenors' and Petitioners' objections. Both sets of objections, submitted in early June 2017, requested EPA's response within 60 days. (ER167, 176 [Intervenors], 127, 149, 163 [Petitioners].) That request was consistent with FFDCA's requirement that the Administrator rule on objections "[a]s soon as practicable." 21 U.S.C. § 346a(g)(2)(C).

The 60-day deadline came and went. As we file this brief, the objections have been in EPA's hands for more than 10 months, but the Administrator remains silent. EPA's brief does not even acknowledge this delay, let alone purport to explain it.

Each day, while EPA unreasonably sits on the objections, infants and children continue to be exposed to chlorpyrifos at levels that EPA has not found safe. EPA cannot insist on compliance with the administrative process and then stop the process from moving.

CONCLUSION

For the foregoing reasons, Intervenors respectfully request that the Court vacate the Administrator's Order and issue a writ of mandamus directing EPA to promulgate a final rule revoking chlorpyrifos tolerances within 60 days of the Court's order. Alternatively, Intervenors ask the Court to find that the Administrator has unlawfully withheld and unreasonably delayed ruling on the pending objections to his Order and direct him to issue a final order within 30 days. In either event, the Court should retain jurisdiction.

Dated: Albany, New York
April 18, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(C) AND NINTH CIRCUIT RULE 32-1

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the undersigned counsel hereby certifies that the forgoing Reply Brief for the State Petitioners-Intervenors complies with the volume limitations in that it is proportionately spaced, has a type-face of 14 points, and contains less than 7,000 (4,771) words, exclusive of the Table of Authorities, Table of Contents, and Certificates of Compliance and Service as measured by the word processing system used in its preparation (Microsoft Word).

/s/ Frederick A. Brodie
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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2018, I served the Reply Brief for the Petitioners-Intervenors on the parties of record in this case by filing same with the United States Court of Appeals for the Ninth Circuit via CM/ECF.

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